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BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

JUL 18 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Cambridge and St. Michaels, MD)

MM Docket No. 92-291
RM-8133

TO: Chief, Mass Media Bureau

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PETITION FOR RECONSIDERATION

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July 18, 1994

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SUMMARY

The Acting Chief, Allocations Branch, refused to grant CWA Broadcasting, Inc.'s request to reallocate FM Channel 232A from Cambridge to St. Michaels, Maryland on the ground that, somehow, this proposal would violate a Commission policy stated in MM Docket 88-526.

In this "Petition for Reconsideration", it is amply demonstrated that the Acting Chief's reason for denying this reallocation does not exist on the facts in the record of the Cambridge, Maryland licensing proceeding, Docket 87-421.

Docket 87-421 did not turn on "civic activities"; the decisional preferences in the case were the minority status of CWA's 100% stockholder, Charles W. Adams, Jr., and his four decades of day-to-day experience working in radio broadcast stations. And even if it could be argued that the case did turn on "civic activities", only one of Mr. Adams two civic activities is outside the 1 mV/m contour of a proposed St. Michaels operation: the Cambridge Black Elks Lodge. The Easton Black Elks Lodge is located within the 1 mV/m contour of both WFBR's authorized facility and the proposed St. Michaels operation. Moreover, were the

Cambridge licensing proceeding to have been for a station at St. Michaels, CWA would have been entitled to even greater qualitative enhancement credit, as Mr. Adams residence in Annapolis, Maryland is within the 60 dBu contour of the proposed St. Michaels operation (See Exhibit A, attached hereto

Therefore, as can be seen from the foregoing discussion, the Commission's policy stated in Docket 88-526 is not violated by the granting of CWA's "Petition for Rulemaking" to permit the reallocation of Channel 232A from Cambridge to St. Michaels, Maryland. Therefore, this "Petition for Reconsideration" must be granted.

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TO: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

CWA Broadcasting, Inc. (CWA), permittee of FM Broadcast Station WFBR, Channel 232A, Cambridge, Maryland, by its attorney, and pursuant to Section 1.106 of the Commission's Rules, hereby respectfully submits this Petition for Reconsideration of the **Report and Order** of the Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau in the above-entitled matter, DA 94-603, released June 17, 1994, dismissing CWA's *Petition for Rulemaking* seeking the reallocation of Channel 232A from Cambridge to nearby St. Michaels, Maryland. In so doing, the following is shown:

Preliminary Statement

1. CWA is 100 percent owned by an African-American, Charles W. Adams, Jr. Mr. Adams has worked in the broadcasting industry for over forty years, since the early

1950s. He was one of the first African-American citizens to have a regular job broadcasting to his fellow citizens in the state of Maryland. So far as we know, he is the only African-American to hold either a construction permit or a license to engage in FM Broadcasting on Maryland's Eastern Shore.

2. CWA filed its "Petition for Rulemaking" which led to the above-entitled proceeding after it had been cruelly denied zoning by Talbot County, Maryland for its transmitter site, which was to be located in a rural area near Trappe, Maryland, between Cambridge and Easton. The reallocation of Channel 232A from Cambridge to St. Michaels was a proposal designed to take advantage of an existing tower of a height suitable for Class A FM Broadcasting. As demonstrated in CWA's "Petition for Rulemaking", a St. Michaels FM station would serve substantial areas in common with a Class A FM station licensed to Cambridge and located at Trappe. CWA's proposal also had the added advantage of providing a first local broadcast service to St. Michaels, without depriving Cambridge of its existing two full-time broadcast stations.¹

¹Those stations are: WCEM(AM), 1240 kHz, 1 kW-U; and WCEM-FM, 106.3 Mhz, 3 kW e.r.p. and 298 ft. HAAT (source: **Broadcasting Yearbook**).

The provision of a first local transmission outlet to St. Michaels is an objective in furtherance of the Commission's mandate to allocate broadcast facilities in a "fair, efficient and equitable manner" to the "states and communities" pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b). See *FM Assignment Policies and Procedures*, 90 FCC 2d 88, 51 RR 2d 807, 810 (1982).

3. In dismissing CWA's "Petition for Rulemaking", the Acting Chief, Allocations Branch, cited a Commission policy stated in *Memorandum Opinion and Order on Reconsideration in MM Docket 88-526*, 5 FCC Rcd 7094, 7097 (1990):

[T]he Commission specifically stated that it would be concerned "if a situation were to arise where a licensee or permittee proposed to change its community of license, and that licensee or permittee had received in a comparative hearing a decisionally significant preference that would not have been granted had the comparative contest been for a station at the new proposed community".

Report and Order in MM Docket No. 92-291, at ¶4. Without analyzing the record facts in MM Docket No. 87-421, the Cambridge, Maryland FM proceeding in which CWA won the construction permit for station WFBR, the Acting Chief

summarized the result of Docket 87-421 as follows²: "the Administrative Law Judge awarded [CWA] a decisive 100% integration credit, enhanced by minority ownership and past civic activities within the service area". *Id.* at ¶4. The Acting Chief stated that "CWA has not addressed this issue". *Id.* at ¶4. Thereupon he dismissed the "Petition for Rulemaking".

4. The purpose of this Petition for Reconsideration is to show that CWA was given credit by ALJ Kuhlmann for only one civic activity which took place outside the 60 dBu contour of the proposed St. Michaels FM station (but within the 60 dBu contour of WFBR's currently authorized facilities); that credit for that civic activity was not decisionally significant in view of the whole record in Docket 87-421; that the policy stated by the Commission in Docket 88-526, *supra*, is no bar to the reallocation of Channel 232A; and that the public interest, convenience and necessity would be well served by a grant of CWA's "Petition for Reconsideration".

²The citations to Docket 87-421 are as follows: **Robert L. Purcell d/b/a Big Bay Broadcasting**, 3 FCC Rcd 6481 (Initial Decision of ALJ Edward J. Kuhlmann, 1988), *affirmed*, 4 FCC Rcd 4676, 66 RR 2d 982 (Rev. Bd. 1989), *rev. den.*, 5 FCC Rcd 1294 (1990).

The Record in Docket 87-421

5. Four mutually-exclusive applications for Channel 232A came on for comparative hearing before ALJ Kuhlmann. Of those, applicant Philip & Eleanor D'Adamo d/b/a D'Adamo Communications (D'Adamo) was disqualified on three separate grounds. *Initial Decision*, 3 FCC Rcd 6481, 6486-87 (¶¶44-48).³

6. The remaining three applicants, CWA, Robert L. Purcell d/b/a Big Bay Broadcasting (Big Bay) and Eastern Shore Broadcasting, Limited Partnership (Eastern), were found basically qualified to be Commission licensees and were compared under the standard comparative issue.

7. No diversification demerits were assessed against any of these three applicants. *Id.*, 3 FCC Rcd at 6487, ¶49.

8. Under the criterion of "integration of ownership and management" which was decisionally significant at that time, both CWA and Big Bay received a decisionally significant preference *vis a vis* Eastern. Both CWA and Bib Bay proposed and received full-time integration credit for their respective 100% owners; by contrast, ALJ Kuhlmann

³It is well settled that only fully-qualified applicants can be compared under the standard comparative issue. *Guinan v. FCC*, 297 F.2d 782, 22 RR 2026 (D. C. Cir. 1962).

allowed only 33-1/3% integration credit for Eastern's proposal to integrate only one of its three owners into the management of its station.⁴ *Id.*, 3 FCC Rcd at 6487-88, ¶¶50-52.

9. Therefore, the decision in Docket 87-421 came down to the "qualitative enhancements" of Big Bay's Robert L. Purcell and CWA's Charles W. Adams, Jr.

10. About Mr. Purcell's "qualitative enhancements", ALJ Kuhlmann made the following findings of fact (*Initial Decision*, 3 FCC Rcd at 6484, ¶28):

Mr. Purcell proposes to move to Cambridge from Rockville, Maryland, where he now works and lives. Big Bay Exh. 3, at 2; Tr. 20. Mr. Purcell works in Rockville as a consulting broadcast engineer; he plans to either sell the business or reduce the time he spends to 10-15 hours per week. Big Bay Exh. 3, at 2. Previously, when Mr. Purcell owned interests in broadcast stations in New Castle, Pennsylvania, Freeland, Pennsylvania and Pocomoke City, Maryland, he did not participate in the day-to-day management. Big Bay Exh. 3, at 2; Tr. 29, 34. Mr. Purcell has no day-to-day-experience in operating a broadcast station. Tr. 33.⁵

⁴Once there is a disparity between quantitative integration proposals of 12½% or more, the party or parties with less integration credit are eliminated from further comparison under "qualitative enhancements". ***The New Continental Broadcasting Company***, 88 FCC 2d 830, 50 RR 2d 1132-33 (Rev. Bd. 1981); ***Van Buren Community Service Broadcasters, Inc.***, 87 FCC 2d 1018, 50 RR 2d 115, 119 (Rev. Bd. 1981).

⁵Although the *Initial Decision* does not state it, Mr. Purcell is a Caucasian male.

11. In the case of CWA's Mr. Adams' qualitative attributes, ALJ Kuhlmann wrote (*Initial Decision*, 4 FCC Rcd at 6484-85, ¶¶29-30):

Mr. Adams would move to a location within the proposed 1 mV/m contour, in the Cambridge area. CWA Exh. 2, at 1-2. Mr. Adams is black and has been employed as a radio broadcast announcer and personality at WANN, Annapolis, Maryland since 1952. CWA Exh. 2, at 4-5.

Mr. Adams claims to have participated in civic activities within the proposed service area. Between 1952 and 1980, he served as a master of ceremonies at the Cambridge Elks Lodge for socials and other events for about 20 hours per year. He was paid only gas money. CWA Ex. 2, at 4. Mr. Adams, from 1966 to 1978, had a similar arrangement with an Elks group in Easton, Maryland. *Id.*

12. Based on these findings of fact, ALJ Kuhlmann concluded that CWA had a "superior qualitative integration proposal". *Initial Decision*, 3 FCC Rcd at 6488, ¶55. ALJ Kuhlmann determined that Mr. Adams was Black and had substantial radio broadcast experience, two attributes that Mr. Purcell did not possess. Further, he held that neither Mr. Purcell nor Mr. Adams resided within the proposed service area, although Mr. Adams "does have some association with the community, having participated in local community activities". *Id.*, at ¶53.

13. Neither the Review Board nor the Commission disturbed these findings of fact or conclusions of law.

Legal Inferences To Be Drawn From the Record

14. As can be seen from the foregoing, there were only two fully-qualified applicants in Docket 87-421 entitled to be compared on "qualitative enhancements" were Big Bay and CWA. And, as can be seen from the foregoing, other than a proposal of its 100% owner to move to Cambridge, Big Bay was not entitled to any qualitative enhancements.

15. By contrast, CWA's 100% owner, Charles W. Adams, Jr. proposed to move to the 1 mV/m contour of the proposed station, which contour included large portions of Talbot County, Maryland which are within the 1 mv/m contour of a CWA operation on Channel 232A at St. Michaels. However, the decisional preference was based on the fact that Mr. Adams was a member of a recognized minority group (African-American), and Big Bay's Mr. Purcell was not. Since neither applicant was entitled to a preference on the basis of past local residence⁶, Mr. Adams minority status was as a matter

⁶At the time MM Docket No. 87-421 was decided, the Review Board's practice was to treat local residence and civic participation as separate enhancing criteria, with past local residence of greater importance than civic activities. See e.g. *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109 (Rev. Bd. 1984) and *Ronald Sorenson*, 5 FCC Rcd 3144

of law decisionally significant in and of itself, without reference to any other enhancing criteria. **Waters Broadcasting Corp.**, 91 FCC 2d 1260, 52 RR 2d 1063 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 56 RR 2d 104 (D. C. Cir. 1984). In **Waters**, the Commission enunciated the principle that minority ownership and local residence were equal in weight, and superior to other enhancements such as broadcast experience.

16. Therefore, Docket 87-421 did not turn on "civic activities". And even if it could be argued that the case did turn on "civic activities", only one of Mr. Adams two civic activities is outside the 1 mV/m contour of a proposed St. Michaels operation: the Cambridge Black Elks Lodge. The Easton Black Elks Lodge is located within the 1 mV/m contour of both WFBR's authorized facility and the proposed St. Michaels operation. See Exhibit A, attached hereto, a mark-up of a map prepared on behalf of CWA and submitted earlier in this proceeding. Even with just one civic activity, CWA would have still prevailed over Big Bay, whose

(Rev. Bd. 1990). It was not until the Commission's *en banc* ruling in **Ronald Sorenson**, 6 FCC Rcd 1952, 1952-53 (1991), where it was definitively held that civic activities were henceforth to be considered with local residence as a unified factor.

owner lived and worked some 70 miles away in Rockville, north of Washington, D. C., and otherwise had no connection with the Cambridge/Easton/St. Michaels area.

17. Moreover, had MM Docket No. 87-421 been a contest for St. Michaels, rather than for Cambridge, CWA would have been entitled to a decisive preference for past local residence. As shown on Exhibit A appended hereto, it turns out that Mr. Adams residence in Annapolis is within the 1 mV/m contour of a Class A FM operation at St. Michaels. Mr. Adams has lived in Annapolis for over 40 years, and was employed at station WANN(AM), Annapolis for most of that time.

18. Therefore, as can be seen from the foregoing discussion, the Commission's policy stated in Docket 88-526 is not violated by the granting of CWA's "Petition for Rulemaking" to permit the reallocation of Channel 232A from Cambridge to St. Michaels, Maryland. "Civic activities" were not decisively significant in the decision in Docket 87-421. Rather, the minority status of CWA's sole stockholder tipped the balance in CWA's favor. Moreover, CWA's sole stockholder had 40 years of day-to-day experience in the operation of a radio station, whereas its competitor,

Mr. Purcell, had no experience in the day-to-day operation of a radio station. With respect to the civic activities for which CWA was given credit, one is outside the 1 mV/m contour of the proposed St. Michaels operation, while the other is within its 1 mV/m contour. CWA's Mr. Adams' proposal to move to a location within the 1 mV/m contour of the presently authorized WFBR facility permits him to locate to a point within the 1 mV/m contour of the St. Michaels facility.

19. It is respectfully submitted that the foregoing overcomes the objection of the Acting Chief, Allocations Branch, to permitting the reallocation of Channel 232A from Cambridge to St. Michaels, Maryland. Indeed, there is no statutory, regulatory or public interest reason preventing the Commission from granting CWA's "Petition for Rulemaking" in the above-captioned proceeding.

Other Matters

20. It is well known to all that the Eastern Shore has had a less than exemplary history of fair treatment of its minority citizens. A recent manifestation of that unfairness was the ultimate refusal by Talbot County authorities to grant a zoning variance to permit

construction of the WFBR tower in a rural area of southern Talbot County near the town of Trappe. By being able to utilize an existing tower suitable for Class A FM broadcasting, CWA can bypass the Talbot County zoning authorities who by their actions seek to keep an African-American from operating an FM Broadcast Station in their county.

21. The ability of CWA and Mr. Adams to construct and operate station WFBR is an important step in redressing the wrongs which have been visited on African-American citizens in Maryland. The Commission is on record as having a program in its regulation of the broadcasting industry to take reasonable actions which do not hurt other parties but which aid and assist minority broadcasters. **Metro Broadcasting, Inc. v. FCC**, 497 U.S. 547 (1990). CWA calls upon the Commission to grant it the leeway it needs to bring WFBR to the air.

22. That leeway is to permit the reallocation of Channel 232A from Cambridge to St. Michaels, Maryland. This does not entail the move of a station from a rural area to an urban area. Rather, station WFBR will still serve substantial areas of the middle Eastern Shore of Maryland, a

rural area with a substantial minority population whose unique needs are unserved by existing local stations. The operation of WFBR by Mr. Adams, a pioneer African-American broadcaster in Maryland who is personally well known to the minority community in the middle Eastern Shore, is utterly the embodiment of the public interest, convenience and necessity. The Commission must help, and not hinder, Mr. Adams in making this happen. The Commission must reallocate Channel 232A to St. Michaels. The Commission must take this action expeditiously.

Conclusion

WHEREFORE, CWA Broadcasting, Inc. urges that this Petition for Reconsideration **BE GRANTED**, and that the Commission **EXPEDITIOUSLY REALLOCATE** FM Channel 232A from Cambridge, Maryland to St. Michaels, Maryland and modify the current authorization for FM Broadcast Station WFBR to specify St. Michaels, Maryland as its community of license.

Respectfully submitted,

CWA BROADCASTING, INC.

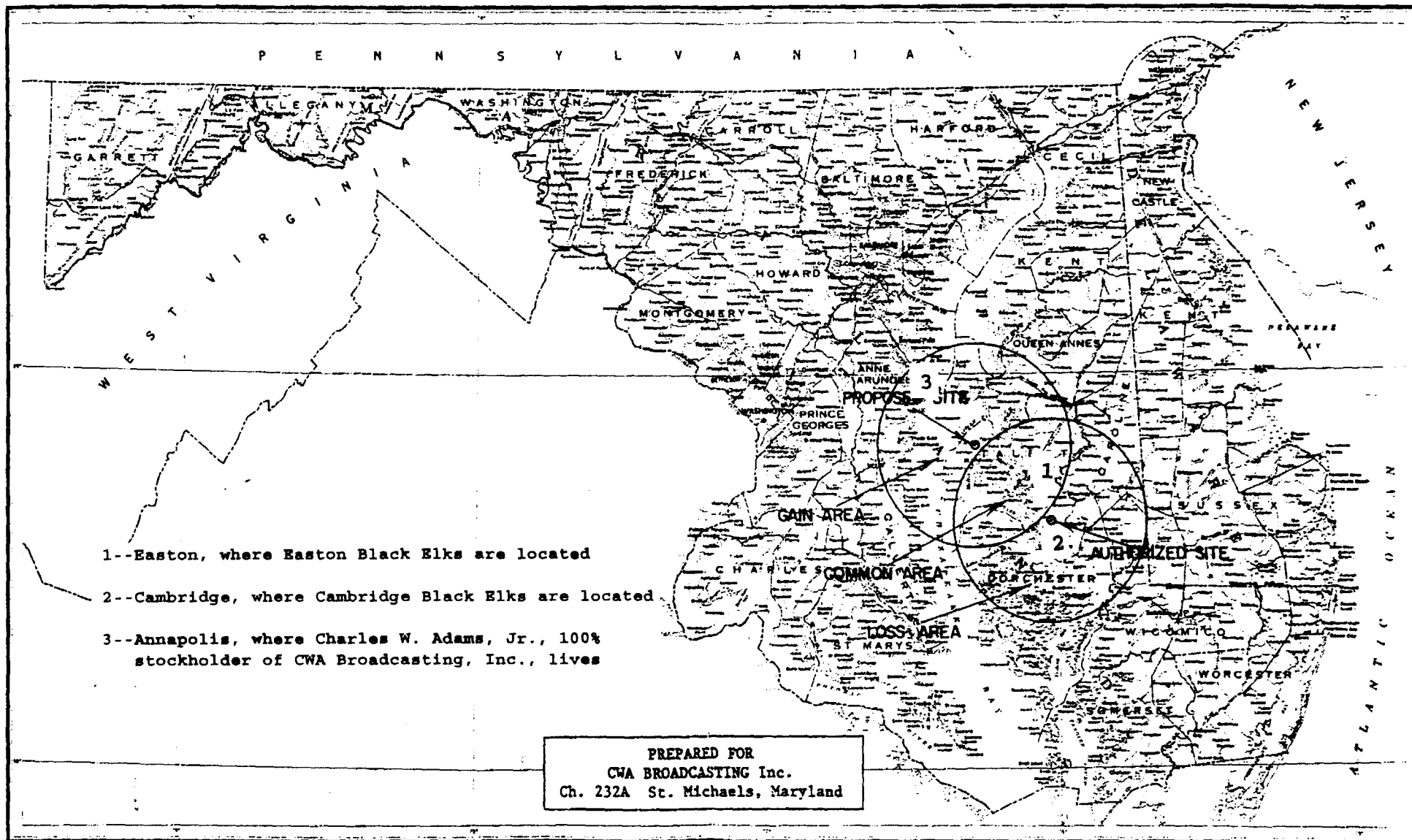
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July 18, 1994

JANUARY 1993



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EXHIBIT A

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Petition for Reconsideration" has been served by first-class United States mail, postage prepaid, on this 18th day of July, 1994, upon the following:

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